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No. 79-1793

In the Supreme Court of the United States

OCTOBER TERM, 1979

SUSAN G. HARRISON, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner contends that the courts below erred in holding that her action for loss of consortium failed to state a claim under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*

1. Petitioner brought this action in the United States District Court for the District of Connecticut, seeking $250,000 damages for the loss of consortium that she allegedly sustained when her husband, an Air Force officer, was injured in the crash of a military aircraft while on active duty. The district court, relying upon this Court's decisions in *Feres* v. *United States*, 340 U.S. 135 (1950), and *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977), dismissed petitioner's complaint (Pet. App. 1a-12a). The court of appeals affirmed (Pet. App.).

2. The courts below correctly applied this Court's prior decisions, and no further review is warranted. It is undisputed that *Feres* would bar petitioner's husband from recovering damages under the Act for any injuries that he sustained. Petitioner contends, however, that her action for loss of consortium is not barred by *Feres* because, under applicable state law, her claim is independent from that of her husband (Pet. 3-5). The courts below correctly concluded that this Court's holdings in *Feres* and *Stencel Aero* applied with equal force to a civilian spouse's claim for loss of consortium.

In *Stencel Aero*, which held that the government was not liable to indemnify a third party for damages paid to a serviceman injured in the course of military service, this Court identified three factors that had been relied on in *Feres*, all of which are also present here. First, the Court noted that "it seems quite clear that when the case concerns an injury sustained by a soldier while on duty, the effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party." *Stencel Aero Engineering Corp.* v. *United States*, *supra*, 431 U.S. at 673. In either event, the trial would involve "second-guessing military orders" (*ibid.*). "The litigation would take virtually the identical form in either case, and at issue would be the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety." *Ibid.* While petitioner's claim may be "independent" as a matter of state law, it is obviously derivative as a factual matter, and this Court's reasoning in *Stencel Aero* is equally applicable here. Second, the Court reasoned that "it makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to a serviceman who sustains service-connected injuries * * * [and] it makes equally little sense to permit that situs to affect the

Government's liability to a Government contractor for the identical injury." *Id.* at 672. There is, as the Court recognized, a need for uniformity in this area, and that uniformity would be undermined by permitting recovery by military spouses, based on the fortuity of the situs of the alleged negligence. Third, recognition of petitioner's claim would undermine the system of compensation for service-connected injuries that Congress established to cover the field in enacting the Veterans' Benefits Act, 38 U.S.C. 321 *et seq.*[1]

There is no conflict among the courts of appeals on this issue. Indeed, the courts of appeals have uniformly barred "independent" claims resulting from service-connected injuries to military personnel. See, *e.g.*, *DeFont* v. *United States*, 453 F. 2d 1239 (1st Cir.), cert. denied, 407 U.S. 910 (1972) (loss of companionship, loss of income); *Van Sickel* v. *United States*, 285 F. 2d 87 (9th Cir. 1960) (damages to family members as a result of alleged wrongful death).

3. Recognizing that her claim is barred by *Feres*, petitioner also argues (Pet. 5-7) that that case should be overruled. But the Court only recently reaffirmed the validity of the *Feres* doctrine in *Stencel Aero*. Moreover, more than 30 years have elapsed since this Court suggested that Congress could overrule *Feres* if that decision did not comport with congressional intent. See *Feres* v. *United States*, *supra*, 340 U.S. at 138. Congress has not done so. The policy considerations upon which this Court based its decisions in *Feres* and *Stencel Aero* are equally applicable today.

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[1]Contrary to petitioner's contention (Pet. 4), the decisions below do not jeopardize "all tort rights of spouses of military persons * * *." Spouses may sue under the Federal Tort Claims Act when their claims do not flow from a service-connected injury.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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